

(2014) 06 CAL CK 0048
In the Calcutta High Court
Case No : C.S. 60 of 1987

Subhas Chandra Sadhukhan

APPELLANT

Vs

Sandha Rani Sadhukhan

RESPONDENT

Date of Decision : 19-06-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11
Stamp Act, 1899 — Section 2(24)
Trusts Act, 1882 — Section 5

Citation : (2014) 06 CAL CK 0048

Hon'ble Judges : Soumen Sen, J

Bench : Single Bench

Advocate : Aniruddha Mitra and Mr. Sukanta Paul, Advocate for the Appellant; Bidyut Kr. Banerjee, Mr. D.P. Bhattacharya, Mr. B.K. Banerjee and Mr. Chirantan Dawn, Advocate for the Respondent

Judgement

Soumen Sen, J.—The plaintiff has instituted the suit for partition of movable and immovable properties situated at 12A, 12B and 12C, Gobinda Sen Lane and 30, Keshab Sen Street, Calcutta (hereinafter referred to as "suit properties"). The plaintiff has also prayed for rendition of accounts and allotment of shares by metes and bounds.

2. The plaintiff No. 1 series are the grand children of Jogindra Nath Sadhukhan. The plaintiff No. 2 series are the great grand children of Jogindra Nath Sadhukhan. The defendant No. 1 is one of the grand daughters of Jogindra Nath Sadhukhan and the defendant No. 2 is one of the grandsons of Jogindra Nath Sadhukhan. The defendant No. 3 is one of the grand children of Jogindra Nath. In fact, the present suit is between the legal heirs of the two daughters of Jogindra Nath against the legal heirs of the son of Jogindra Nath.

3. On or about 10th March, 1949, one Balai Chand Sadhukhan since deceased who is the common ancestor of all the parties in the suit, executed a Deed of Settlement which was registered with the Registrar of Assurance on 11th March,

1949. The deed of settlement, according to the plaintiff, provides that Balai Chand has created a trust of which he as the settlor made permanent provisions or arrangements for the benefit of himself during his lifetime and for benefit of his five sons and their respective heirs and for that purpose he appointed himself as the First Trustee in respect of the properties settled thereunder and transferred, conveyed, assigned and assured unto him or the person and/or persons who would act as Trustee or Trustees all the immovable properties forming part of the settlement.

4. The said Balai Chand Sadhukhan had five sons, namely, Surendra Nath Sadhukhan, Nagendra Nath Sadhukhan, Jitendra Nath Sadhukhan, Debendra Nath Sadhukhan and Jogindra Nath Sadhukhan. The Deed of Settlement made specific provisions in respect of the properties covered under the said trust for the respective use and benefit of the five sons and their respective heirs. At the time of execution of the Deed of Settlement, the wife and daughters of the said settlor were predeceased. The settlor died in or about 1950 and in terms of the said Deed of Settlement, the five sons of the settlor became trustees respectively in respect of the allotments of the properties made in the said Deed of Settlement.

5. All the said five sons of the said settlor had died.

6. Debendra Nath Sadhukhan and his wife Smt. Usha Rani Sadhukhan died in the year 1992. Debendra Nath died issueless. Accordingly, the said property would devolve absolutely and forever upon the heirs of the said Jogindra Nath being the plaintiffs and the defendants. The remaining properties upon which the said Surendra Nath Sadhukhan and Jogindra Nath Sadhukhan, both deceased, respectively had life interest have absolutely and forever devolved upon the heirs of the said Jogindra Nath Sadhukhan being the parties to the suit by virtue of the said Deed of Settlement which are all actually the properties of which partition is claimed in this suit. The trust created in respect of the said properties under the Deed of Settlement have ceased upon the death of the wife of Jogindra Nath, namely, Smt. Kamalabala Sadhukhan. Kamalabala died in 1978, leaving her surviving two daughters Smt. Puspa Lata Sadhukhan, since deceased, and Smt. Ashalata Sadhukhan, since deceased and the said Brajo Mohan Sadhukhan, since deceased. Puspa Lata, Ashalata and Brajo Mohan, since deceased, ultimately inherited the said properties in equal share absolutely and forever. Amongst sons and daughters of Jogindra Nath Sadhukhan, Smt. Puspa Lata Sadhukhan died intestate in or about 1981 leaving her surviving two daughters. The plaintiff has claimed shares in the properties in the manner as indicated in Paragraph 10 of the Plaint which is stated below:-

1. Subhas Chandra Sadhukhan-Plaintiff No. 1 (a)-1/12th Share
2. Ajay Kumar Sadhukhan-Plaintiff No. 1(b)-1/12th Share
3. Smt. Jharna Paramanik-Plaintiff No. 1(c)-1/12th Share

4. Jayanta Sadhukhan-Plaintiff No. 1(d)-1/24th Share
- 4(a). Piyali Ghosh (Sadhukhan)-Plaintiff No. 1(e)-1/24th Share
5. Smt. Jaya Sadhukhan-Plaintiff No. 2-1/9th Share
6. Smt. Rubi Das-Plaintiff No. 3-1/9th Share
7. Smt. Sandhya Rani Sadhukhan-Defendant No. 1-1/9th Share
8. Gopal Chandra Sadhukhan-Defendant No. 2-1/9th Share
9. Ram Prasad Adhikary-Defendant No. 3 1/18th Share
- 9(a). Shrimanta Adhikary-Defendant No. 3(a) 1/18th Share

7. After the death of Smt. Kamalabala in the year 1978, during the lifetime as well as after the death of Smt. Puspa Lata in 1981, the said Brajo Mohan, since deceased, tried to grab entire immovable properties. Brajo Mohan during his lifetime collected rents and, thereafter, the defendants are still collecting rents issues and profits of the said properties and was/are misappropriating the same without rendering any proper accounts to the plaintiffs in spite of several intimations with a view to deprive the plaintiffs of this due share in the properties. The defendants have also failed and neglected to agree or come to an amicable partition for moveables, namely, ornaments, fixtures, furniture and utensils which are part of the joint properties and Brajo Mohan during his lifetime and thereafter the present defendants trying to appropriate the said properties and all the movables lying in the custody of the defendants after the death of Brajo Mohan. Since disputes and differences have arisen between the parties regarding joint possession and enjoyment of the properties and the defendants have failed and neglected to agree or come to an amicable partition and division of the same, the plaintiffs are constrained to file the instant suit.

8. On the basis of the aforesaid, the plaintiff instituted the suit for partition.

9. The defendants originally filed written statement on 9th November, 1987.

10. Subsequently with the leave of the Court, additional written statements were filed on 20th January, 2012 and 4th March, 2008.

11. In the original written statement, the defendant has stated that Premises No. 12, Gobinda Sen Lane, is the ancestral residential House wherein said Balai Chand Sadhukhan, the settlor of the said Deed of Settlement used to reside. The said premises No. 12, Gobinda Sen Lane, has only one entrance gate and there is no provision for making any other entrance gate in any manner. The settlor divided the said premises in Lot "A", "B" and "C" and subsequently renumbered as 12A, 12B, 12C, Gobinda Sen Lane, for the purpose of allotment of residential accommodation to his three sons and their wives for their lifetime in such a way that after cessation of the Trust created by the said Deed of Settlement dated 10th March, 1949, the said ancestral residential house would come in the hands of the heirs of one of the sons of the settlor, namely, Jogindra Nath Sadhukhan

so that the said entire ancestral residential house being premises No. 12, Gobinda Sen Lane and subsequently renumbered as 12A, 12B and 12C Gobinda Sen Lane would ultimately remain as one dwelling unit of the male heirs of Jogindra Nath Sadhukhan. The plaintiffs have no right to claim partition of the said ancestral residential house as the said premises is still used as the residential house of the male heirs of said Jogindra Nath Sadhukhan since deceased.

12. It is stated that Kamalabala Sadhukhan with an intention to avoid future disputes during her lifetime distributed her moveable properties amongst her son and the daughters, namely, Brajo Mohan, Puspa Lata and Ashalata and in respect of the rest of the moveable properties, the said Kamalabala Sadhukhan executed a Will which was found out by the present defendants from the old papers after the demise of Brajo Mohan Sadhukhan. The executrix of the said Will was Smt. Sandhya Rani Sadhukhan and she had applied for grant of probate of the said Will.

13. The said application for probate has been numbered as Probate Case No. 108 of 1987. The defendants are maintaining the said properties in good condition and order by regularly repairing. The defendants have paid all the municipal rates and taxes in the name of the Estate of Jogindra Nath Sadhukhan. The daughters of late Kamala Bala Sadhukhan and Jogindra Nath Sadhukhan, namely, Puspa Lata and Ashalata and the plaintiffs Nos. 2, 3 and 4 all along have been residing at their respective houses with their family members. The defendants have been actually in absolute possession of the entire suit properties for themselves and on behalf of the plaintiffs by collecting the rents and profits.

14. In the Additional Written Statement filed on 4th March, 2008, the defendants stated that the defendants have been in exclusive possession as owner of the said Lot "C" of the said premises No. 12, Gobinda Sen Lane since the demise of the principal defendant's father and mother. The said premises has been renumbered as 12C, Gobinda Sen Lane. The document in question was termed as "family settlement". The property was intended to be settled in favour of the five sons of the Settlor, namely, Balai Chand Sadhukhan. The document took effect immediately on the execution and registration. The execution of the said Deed of Settlement took place on 10th March, 1949. The said five sons of Settlor were put to possession. The Settlor possessed the said property as trustee. The said five sons of the Settlor remained in possession after the Deed of Settlement was executed. The Settlor and the beneficiaries reside in the property and had their right to reside therein. The document was neither described as a Deed of Gift nor it was in the form of a Deed of Gift. The stamp duty payable was not of Deed of Gift but for Deed of Settlement. A family settlement is always respected by law and the courts. The conduct of the parties and the contents of the deed would require proper interpretation on the principles settled by the Courts and the said deed if properly interpreted would show that it is an admixture of gift or partition or trust. Family arrangement/settlement is accepted as a transfer of

interest in the property in favour of a person between whom the family arrangement or settlement is made. The settlor made the settlement in order to settle his properties to fulfil his desire of disposition of the property for the benefit of the members of his family during his lifetime. At the same time the Settlor imposed some restrictions for protecting his own interest so as to hold the family together and save the family being disintegrated and the property being squandered or dissipated. The settlement was, in fact, accepted and acted upon. In the year 1950, a dispute arose among the five sons of the Settlor regarding the administration and management of the trust property along with a declaration of their right, title and interest. The suit was instituted being C.S. No. 584 of 1950 of right, title and interest of the plaintiffs in the suit happens to be the first four sons of the said family, namely, Surendra Nath, Nagendra Nath, Jitendra Nath and Debendra Nath against Jogindra Nath Sadhukhan and Brajo Mohan Sadhukhan. The said suit was decreed on compromise. The Deed of Settlement and the Deed of Debutter Settlement both dated 10th March, 1949, were declared valid and binding on all the parties and the immoveable and moveable properties comprised therein were declared to be absolute property of the said Balai Chand Sadhukhan.

15. In view of such declaration, the property in question is a trust property and after the death of Jogindra Nath Sadhukhan, Brajo Mohan became the sole trustee. Accordingly, the question of partition of the suit property could not and does not arise.

16. The trust property does not come under the purview of the Partition Act.

17. In the subsequent Additional Written Statement filed on 20th January, 2012, it was stated that in the suit being Suit No. 584 of 1950, the said four sons had prayed for a declaration that the Deeds of Settlements dated 10th March, 1949 and the Will dated 18th August, 1947 are invalid, ineffective and not binding on the said four sons along with a prayer for declaration that no right, title and interest whatsoever in any of the properties or business mentioned in the Plaint has accrued in favour of the defendants. The said plaintiffs have also prayed for rendition of accounts, partition and injunction.

18. In the said suit, the Hon'ble Court appointed Guardian-ad-litem for the infant defendant and the deity. Jogindra Nath Sadhukhan was appointed as Guardian-ad-litem of his minor son, Brajo Mohan Sadhukhan. The Deed of Settlement and the Deed of Debatter Settlement both dated 10th March, 1949 were upheld and it was declared that the said deeds are binding on all the parties and the immovable and moveable properties comprised therein were declared to be absolute property of Balai Chand Sadhukhan, since deceased. Certain other directions were given with regard to payment of certain amount to the other brothers by Jogindra Nath during their lifetime. In the Will dated 18th August, 1947, Balai Chand as testator made provisions in respect of his properties both moveable and immovable. In paragraph 10 of the Will, he made a declaration that "from and after the date of retirement or desire to termination of any one of

my trustees, a new trustee shall be appointed from his male heirs in the male line including such trustee, seniority shall always prevail". In the said proceeding Brajo Mohan Sadhukhan was impleaded as the only heir and the married daughters, namely, Smt. Ashalata and Smt. Puspallata were not made parties to the said suit since they were married and, accordingly, their heirs could not be considered as heirs to inherit any part of the estate of Balai Chand Sadhukhan. It is stated that it would be clear from the deed of trust that the Settlor Balai Chand in unequivocal term provided that under no circumstances, the trust created by him would come to an end or extinguish. It is further stated that in view of the contents of the Will dated 18th August, 1947, which is binding on all the parties, the question of inheritance could not be considered dehors the provisions of the said Will.

19. On the basis of the aforesaid pleadings and the documents disclosed, the following issues were settled and set down for trial:-

1. Is the suit maintainable?
2. Are the properties comprised in two Deeds of Settlement dated 10.03.1949 executed by Balai Chand Sadhukhan deceased, trust properties?
3. Are the plaintiffs entitled to claim partition of the suit property fully mentioned in paragraphs 6 and 12 of the plaint?
4. Are the plaintiffs entitled to file and maintain this suit, after the order dated 16.4.1951 passed in Suit No. 584 of 1950 (Surendra Nath Sadhukhan & Ors.-Vs- Jogindra Nath Sadhukhan & Ors.) by Hon"ble Justice S.R. Dasgupta, on the basis of terms of settlement filed by the parties to the said suit?
5. Are the defendants liable to render accounts in respect of the suit properties?
6. Are the plaintiffs entitled to any relief in this suit?

20. The learned Counsel for the defendant has referred to plaint, written statement and terms of settlement filed in Suit No. 584 of 1950. It is submitted that the suit was instituted by the four sons against Jogindra and the deities mentioned in the said suit. The plaintiffs, inter alia, prayed for declaration that the said Deeds and Will are invalid, not effective or binding on the plaintiffs and are required to be declared void or voidable at the option of the plaintiffs. A further declaration was prayed for that no right, title or interest in any of the properties or business had passed to any of the defendants under the Deed or Will.

21. The said suit was disposed of on the basis of terms of settlement filed by the parties. The learned Counsel submitted that although in the decree passed on the basis of the terms of settlement, no express order was passed with regard to the validity of the Will but at the same time, there is no express order either declaring the said Will as invalid. On a question being put to the learned Counsel as to what is the definite stand of the defendants with regard to the said Will, it

is submitted that the validity of the Will would have a bearing in this proceeding and since the Will was not held to be invalid the parties cannot rest their claim on inheritance or interfere with the appointment of trustee excepting from the male heirs in the male line.

22. Mr. Bidyut Kr. Banerjee, the learned Counsel appearing on behalf of the defendants submits that the instant suit is barred by *res judicata*. This argument is made on the basis of the terms of settlement filed being Suit No. 584 of 1950. It is submitted that Jogindra Nath in the said proceeding has admitted that Balai Chand voluntarily and on his own accord executed his last Will and testament on 1st August, 1947. In the said proceeding only the minor son of Jogindra Nath, namely, Brajo Mohan was impleaded and the daughters were left out. Jogindra Nath in the said proceeding has filed an affidavit affirmed on 12th April, 1951 in connection with his appointment as guardian-ad-litem to his minor son Brajo Mohan wherein he had declared that he had no interest in the subject matter of the suit directly or indirectly adverse to that of the said infant defendant Brajo Mohan and he would be fit and proper person to act as a guardian-ad-litem of the said infant defendant Braja Mohan. The terms of settlement was filed by the then plaintiffs and Jogindra Nath as guardian of the said deities and his only minor son Brajo Mohan Sadhukhan. It was on the basis of the said terms of settlement, a decree was passed. It is argued that the reason for impleading the minor son of Jogindra Nath in the said suit is due to paragraph 10 of the Last Will and Testament of Balai Chand dated 18th August, 1947 which provides that from and after the date of retirement or desire to termination of any one of trustees, a new trustee shall be appointed from the male heirs of Balai Chand in the male line and in choosing such trustee, seniority shall always prevail.

23. In view of the aforesaid, it is contended that the present defendant No. 2 Gopal Chandra Sadhukhan is the only male heir in the male line and is a fit and proper person to be appointed as a trustee according to the said intention of the said settlor. The female heirs of Jogindra Nath, thus, could never be a trustee and would not stand or claim succession to the properties left by said Balai Chand Sadhukhan. In view of the aforesaid, the plaintiffs cannot claim any right or title to the property left by the said Jogindra Nath Sadhukhan after the said decree was passed in the aforesaid suit being Suit No. 584 of 1950.

24. Moreover, there is a legal bar in view of Section 11 of the CPC to proceed with the instant suit. The issues raised in this suit has been conclusively decided in Suit No. 584 of 1950. The suit was decreed on the basis of the terms of settlement which is not only binding on the parties of the suit put to their successor in interest. The parties have accepted and acted upon the said decree. Accordingly, in the submission of the learned Counsel for the defendants issues Nos. 1, 2 and 3 are required to be held against the plaintiffs. The bar of *res-judicata* has rendered the suit not maintainable. The plaintiff should not be allowed to relitigate on such issues and permitted to reopen the said proceeding.

25. In this regard, the learned Counsel has relied upon a decision of the Hon''ble

Supreme Court reported in Shankar Sitaram Sontakke and Another Vs. Balkrishna Sitaram Sontakke and Others, and submitted that it was held in the said decision that a consent decree is as much binding upon the parties thereto as a decree passed by invitum. The compromise having been found not to be vitiated by fraud, misrepresentation, misunderstanding or mistake, the decree passed thereon had the binding force of res-judicata and the plaintiff was barred from re-agitating the question of accounts in a fresh suit.

26. It is argued that the aforesaid compromise decree closed once for all, any claim to be made by the daughters. Moreover, from the evidence both oral and documentary it would appear that the properties sought for partition are trust properties. The settlor, Balai Chand Sadhukhan did not make any provision for alienation or transfer and no power has been conferred upon the trustees for such disposition. It is well-settled law that a trust property cannot be a subject matter of partition suit. Accordingly, the suit should be held not maintainable.

27. The learned Counsel has relied upon a Division Bench decision of High Court in the case of Dulal Chandra Chatterjee and Others Vs. Moni Mohan Mukherjee and Others, where it has been, inter alia, held that a family settlement is always respected by law and the Courts. In accordance with the intention of the settlor, Balai Chand Sadhukhan, the title to the property had already passed to the defendant No. 2 Gopal Chandra Sadhukhan, since the predecessor-in-interest of the present plaintiffs and the original plaintiffs have acted upon the terms and conditions of settlement of the said Suit No. 584 of 1950. The witness of the plaintiffs in cross-examination in reply to question No. 45, said that Jogindra Nath Sadhukhan was the first defendant in the Suit No. 584 of 1950. In answer to question No. 47 in cross-examination, the witness of the plaintiffs stated that in the said Suit No. 584 of 1950, it was settled that Jogindra Nath Sadhukhan would have his life interest and his issues would get the property after their birth. In answer to question No. 49 in cross-examination, the witness stated that the two trusts deeds dated March 10, 1949 and the Will executed by Balai Chand Sadhukhan are valid, operative and binding on the parties. He further stated that in the terms of settlement of the said Suit No. 584 of 1950, no question of partition of any property under the said two Deeds were mentioned.

28. During the lifetime of Balai Chand Sadhukhan or any time thereafter any property or any portion of the property left by him, was not sold. The case of the plaintiffs, in particular, with regard to the claim of partition or accounts, has not at all been dealt with by them at the time of trial of the suit, either by adducing any evidence or producing any document for consideration of the Hon''ble Court.

29. The argument appears to be that after considering the family settlement and the trust created by Balai Chand Sadhukhan, disclosing his intention in unequivocal term as to the succession to the property clearly expressed by him in paragraph 10 of the Will dated 1st August, 1947, the instant suit should fail.

30. It is contended that the two deeds dated 10th March, 1949 forming the part

of the consent decree clearly stipulates that in the event any property sold the proceeds thereof shall be invested for purchasing another property and such property would form part of the trust of the estate. During the lifetime of Balai Chand and even thereafter no property has been sold by any one of the parties. No situation had occurred which may result in dissolution of the trust. The contention of the respondent that on the death of the persons named in the deed of settlement dated 10th March, 1949, the trust would come to an end is baseless and contrary to the documents which the plaintiffs have relied in this proceeding. Moreover, in the instant case, no partition is possible without selling of properties which if allowed would be contrary and in violation of the clear intention of the settlor.

31. In the instant suit, the plaintiffs filed application for appointment of receiver. The original plaintiff No. 1 Sm. Ashalata Sadhukhan and after her the plaintiff No. 4 Narendra Nath Sadhukhan were the Receiver along with the defendant No. 2 Gopal Chandra Sadhukhan, who evinced that Sm. Ashalata Sadhukhan and Narendra Nath Sadhukhan were having custody of all the accounts, receipts and Bank documents which are unrebutted. No suggestion imputing the veracity of the testimony of the defendants has been given even. The plaintiffs have not produced the documents. The witness of the defendant was cross-examined at length but he was specific in his statement that the accounts were maintained by Sm. Ashalata Sadhukhan and after Narendra Nath Sadhukhan. The present plaintiff No. 1 Subhas Chandra Sadhukhan has restrained the tenants to pay rent to Gopal Chandra Sadhukhan and inviting developers to develop the suit properties. He also evinced that he is making payment of corporation taxes and produced paid tax bills at the time of his cross-examination, which are marked as Exhibits. The deposition has gone unchallenged. Therefore, the defendants, in consideration of the facts and circumstances of the suit are not liable to render any account. In the instant case, the plaintiffs failed to establish even prima facie case in support of their claim in answer to the issues framed for trial of the suit.

32. It is submitted that the Court shall have due regard to the intention expressed by the settlors in the aforesaid two Deeds of Settlement as well as the Will which make no provision for the married daughters inasmuch as the daughters could not be appointed as trustees. The daughters cannot have any right to claim share in the properties left by the settlor in any manner howsoever.

33. In short, the learned Counsel submitted that in consideration of the facts and circumstances of the case and in particular the plaint of the Suit No. 584 of 1950, the written statement of Jogindra Nath Sadhukhan, filed in the said suit, his affidavit in compliance with the order of the Hon"ble Court in the said suit, the terms of settlement and the decree passed in the said suit, the suit should be held to be barred by res-judicata and shall be dismissed summarily.

34. Per contra, Mr. Aniruddha Mitra, the learned Counsel appearing on behalf of the plaintiffs submits that from the pleadings as well as from the evidence, the following facts are admitted:-

(a) The registered Deed of Settlement dated 10th of March, 1949 was executed by Balai Chandra Sadhukhan;

(b) By virtue of the compromise and the Terms of Settlement dated 16th April, 1951 filed in C.S. No. 584 of 1950 the heirs of Balai Chandra Sadhukhan had admitted that the said Deed of Settlement which was challenged in the above suit is valid and binding on all the parties.

(c) No probate of the Will dated 1st August, 1947 of Balai Chandra was obtained. Though challenged in 1950 suit, the Will did not find place in the Terms of Settlement dated April 16, 1951.

35. The learned Counsel in this regard has placed reliance on the internal page 3, 4, 5 and 6 of the Deed of Settlement dated 10th March, 1949. In so far as the Deed of Debuttar is concerned the same is not the subject matter of the instant partition suit. The Deed of Settlement clearly provides that on the death of Surendra, Debendra, Usha Rani and Kamala Bala Dasi the properties would be enjoyed, used and for benefit of all sons and heirs of Jogindra absolutely and forever. Jogindra and his wife Kamala Bala had died.

36. The intention of the settlor needs to be looked into. Though the Will was executed, Balai Chandra decided to execute two trust Deeds. Subsequently, one being a trust for a limited period and the other being a Debutter Deed i.e. for perpetuity. By executing these two documents Balai has deviated from the manner of bequest he intended to make under the Will.

37. It is argued that on the death of the persons named in the Deed of Settlement dated 10th of March, 1949 the trust came to an end and the properties devolved completely, unconditionally, absolutely and forever upon the heirs of Jogindra Nath Sadhukhan for their use and benefit and as such the same became secular properties.

38. The Will of Balai Sadhukhan was given a go-bye and never probated.

39. On cessation of the trust the properties cannot be treated any more as trust property and all the legal heirs of Jogindra being his two daughters and sons are entitled to 1/3rd share each in the estate of Jogindra being the properties mentioned in the Deed of Settlement. The parties to the instant suit are all legal heirs being son and daughters of Jogindra and they are entitled to their respective shares in the properties. In view of the fact that the properties are no more trust properties and presently is secular, the plaintiffs are entitled to claim partition.

40. In view of the Terms of Settlement filed by the parties in Suit No. 584 of 1950 whereby the Deed of Settlement was declared to be valid and binding upon the parties and on cessation of the trust on the death of the persons having life interest, the instant suit for partition is maintainable.

41. The defendant no. 2 who is all along a Joint Receiver for the last 25 years

and has taken no initiative to maintain accounts nor have filed any accounts in spite of the orders passed by this Hon''ble Court on 24th of February, 2010.

42. On the aspect of rendition of accounts, it is submitted that by an order dated 1st February, 1988 this Hon''ble Court was pleased to appoint Gopal Chandra Sadhukhan and Asha Lata Sadhukhan as Joint Receivers over and in respect of the properties with various duties and powers as mentioned in the said order. By an order dated 12th February, 1991 Narendra Nath Sadhukhan was appointed Joint Receiver in place and stead of Asha Lata Sadhukhan along with Gopal Chandra Sadhukhan.

43. The learned Counsel has referred to a decision of the Hon''ble Supreme Court reported in Ganeshi (D) through L.Rs. and Others Vs. Ashok and Another, and submitted that it is well-settled that a family settlement is not transfer of property. The intention of the settlor is to bring about a family settlement. The defendants have also accepted that the Deed of Trust was, in fact, a family settlement. A family settlement is not a transfer of property. The terms of settlement resulted in the compromise decree would clearly show that such compromise was arrived at in order to avoid disputes in the family. The said terms of settlement has been acted upon.

44. In view of the aforesaid facts, the right of the plaintiffs to claim share in the properties cannot be denied.

45. In the premises, it is submitted that this Hon''ble Court may be pleased to declare the share of the parties as prayed for and pass a preliminary decree to that effect. Commissioner of Partition be appointed to effect partition of the joint properties and to administer the same by taking necessary steps for collection rents.

46. On the basis of the pleadings and the evidence on record, it needs to be seen if the plaintiff has been able to establish its claim for partition. The argument on behalf of the defendant that it is a trust property and, accordingly, no partition can be affected appears to be a weak defence to the claim for partition. There cannot be any doubt that Balai Chand initially created a trust by way of a Will but later on he had executed two deeds of settlement which virtually rendered the said Will infructuous. Although there is no formal revocation of the Will by Balai Chand during his lifetime but the subsequent course of events leading to the passing of the consent decree in a proceeding in which the sons of Balai Chand were asserting their rights in the properties clearly shows that the sons of Balai Chand had agreed to settle their disputes amicably. The recitals and the contents of the terms of settlement clearly show that the parties had agreed to settle their disputes amicably and they had agreed to be governed by the deed of settlement.

47. The Will and the Deed of Settlement cannot co-exist. The terms of settlement clearly shows that the parties to the suit had agreed to settle the dispute "having regard to the claims set up by the plaintiffs and the uncertainty of the results of the litigations and to avoid all risks and in settlement of all differences and

disputes between the parties and partly by way of family settlement and arrangement and partly to save the Debuttar Estate created by the late Balai Chand Sadhukhan" and had agreed to settle their disputes which, inter alia, includes the following terms:-

The Deed of Settlement and the Deed of Debuttor Settlement both dated the 10th day of March, 1949 are declared valid and binding on all the parties and the immovable and movable properties comprised therein are hereby declared to be the absolute property of the late Bolai Chand Sadhukhan.

48. The terms of settlement contains certain terms which are not fully covered under the Deed of Settlement. The sons of Balai had never taken any steps to have the Will probated. The Will does not find any mention in the terms of settlement. It clearly shows that the parties have abandoned their claim arising out of Will and had agreed to settle their disputes on terms recorded in the terms of settlement. The said terms of settlement are in effect an agreement reached by and between the parties.

49. The written statement filed by the defendants also does not lay much emphasis on the Will. The written statement proceeded on the basis that the deed of settlement is in the nature of family settlement. If a family settlement is arrived at between the parties, the said settlement obviously is between the sons of Balai Chand (since deceased). Even if one comes to a conclusion that the properties are trust properties and cannot be partitioned, the fact remains that under the deed of settlement after the death of Kamala Bala Dashi, all the sons and heirs of Jogindra would jointly enjoy the suit properties absolutely and for ever. The said Deed of Settlement contemplates a contingent right, which becomes a vested right with the death of Kamala Bala Dashi. The contention of the defendants that the Deed of Settlement contemplates that only the main line of Jogindra would be entitled to enjoy the said property and claim residential right in respect of the properties in question are totally ill founded and in total misconception and misreading of the deed of trust.

50. The intention of the settlor as could be gathered from the deed of settlement is that on the death of the persons named in the deed of settlement dated 10th March, 1949, the trust would come to an end and the properties would devolve completely, unconditionally, absolutely and forever upon the heirs of Jogindra Nath for their benefits. The deed of settlement dated 10th March, 1949 clearly stipulates that after the death of Kamalabala, all the sons and heirs of Jogindra Nath would use the property jointly and absolutely forever which clearly suggests equal enjoyment by the heirs of Jogindra Nath and this clause cannot be watered down and negated by taking recourse to Clause 10 of the Will as is being attempted by the defendant. The defendants also have accepted that the said deed of settlement is nothing but a family arrangement. The two deeds of settlement read with the terms of settlement culminating in a consent decree clearly show that the sons of Balai Chand had agreed to settle all their disputes and, accordingly, they have entered into a family arrangement. Where a

settlement had been arrived at and a decree has been passed on the basis of such compromise which was found to be lawful, it cannot be contended that plaintiff in this suit is seeking to reopen the issues decided in the earlier suit. In fact, if the argument of the defendant is accepted it would amount to reopening of the consent decree. A family settlement is entered into for achieving a larger purpose, that is, achieving peace and harmony in the family. If Balai Chand was only happy and content with the execution of the Will creating a Trust then he would not have during his lifetime executed two several deeds of settlement. Balai Chand has consciously used the term "Settlement" instead of "Trust". By virtue of the deed of settlement making permanent provisions or arrangement for Balai and his heirs, the Will perishes. In view thereof, reference to Clause 10 of the Will cannot assist the defendant in resisting the claim for partition by the plaintiffs.

51. The settlor was the owner of the properties forming the Deed of Settlement. The word "settlement" is defined in Section 2(24) of the Indian Stamp Act, 1899. The word "settlement" as it is generally understood really refers to a disposition of successive interests in immovable property and is generally couched in the form of a trust and it is such a settlement which is in the nature of disposition of property, movable or immovable, either in consideration of marriage or for one or more of the objects specified, namely, religious, charity or provision for family dependants or others that is contemplated u/s 2(24) of the Act (Bhupati Nath Chakravarty Vs. Basanta Kumari Devi,). A settlement is a non-testamentary disposition in writing of property for the purpose of providing for those for whom the settlor desires to make a provision.

52. Balai Chand initially thought of creating a trust by a testamentary instrument as Section 5 of the Indian Trust Act, 1882 contemplates that a trust can be created by a Will. However, subsequently as it appears from the two several deeds of settlement, Balai Chand thought that he should make a family arrangement for the benefit of his five sons and their legal heirs. Although, the Deed of Settlement dated 10th March, 1949 does not expressly revoke the Will but the very essence and execution of the said document, clearly nullifies, perishes, extinguishes and revokes the Will. In the Deed of Settlement, Balai Chand described himself as the first settlor and a trustee. The object and purpose of the said Deed of Settlement is to make a permanent provision or arrangement for Balai Chand during his lifetime and for the five sons and their respective heirs.

53. It was with the aforesaid object and in consideration of natural love and affection, which Balai Chand had for his sons, Balai Chand appointed himself as a first trustee. The said Deed of Settlement in the nature of family arrangement meticulously records how the said properties are to be enjoyed by the sons and their legal heirs and ultimately upon the death of Kamala Devi Dashi, all the sons and heirs of Jogindra Nath would be entitled to enjoy the property absolutely and forever. The phrase "absolutely" and "forever", in my opinion, clearly brings the

real intention of the settlor, that is to say, the legal heirs of Jogindra Nath, irrespective of male or female would be entitled to absolute enjoyment of the properties forming the part of the Deed of Settlement uninterrupted by any adverse claim. The present dispute arises in course of enjoyment of the said properties in view of stand taken by the defendants that the Will still survives and the male line in the male heirs as indicated in the Will creating the trust should be followed and has been followed. The plaintiffs in view of Clause 10 of the said Will cannot be appointed as a trustee nor they can make any claim for partition of the property. The second limb of the submission is based on an understanding that the Deed of Settlement has created a trust and the properties are trust properties. There cannot be a partition of trust properties. Even if this argument is accepted the filing of the suit claiming partition based on the Deed of Settlement containing the clause that upon the death of Kamalabala, all the sons and heirs of Jogindra would enjoy the properties absolutely and forever unquestionably gives right to each of the sons and legal heirs of Jogindra Nath to claim partition in the even any dispute arise with regard to the manner and enjoyment of the said properties. However, the deed of settlement while providing for the appointment of the trustees does not exclude female heirs of Jogindra Nath to be considered as trustees which is discernible from the clause mentioned below:-

Provided further that from and after the death of the first trustee hereby created, all the surviving sons of the said settlor and in their absence their heirs respectively be trustees of these presents in respect of the allotment of the property made hereunder.....

54. This is a clear departure from the manner in which the trustees are to be appointed in terms of the Will executed earlier. The defendants based on Clause 10 of the Will and their understanding that they are entitled to the exclusive possession of the said properties resist this partition suit. The defendants have taken three different stands in the three written statements filed over a gap of about 22 years since the first written statement was filed on 9th November, 1987 and the additional written statements subsequent thereto were filed on 4th March, 2008 and 20th January, 2012. The defendants, however, admit that the Deed of Settlement is in effect a family arrangement. The intention of the settlor to provide a permanent arrangement initially suffered a set back when four of the sons filed the suit against Jogindra Nath challenging the Will and the several deeds of settlement. This suit being Suit No. 584 of 1950 was settled on the basis of the settlement filed which, inter alia, records that the parties to the said suit have agreed to enter into a terms of settlement partly by way of a family settlement and arrangement and partly the said Debuttar estate created by Balai Chand. The Deed of Settlement read with the terms of settlement forming the consent decree clearly shows that the legal heirs of Jogindra Nath after the death of Kamalabala would be absolutely ceased and possessed all the properties forming part of the Deed of Settlement. The very purpose of the said Deed of Settlement is to ensure the legal heirs of Jogindra Nath enjoyed the said property

absolutely and forever after the death of Kamalabala. This family arrangement, in my view, is sought to be disrupted by Gopal Chandra Sadhukhan and his group by making a tall and over jealous claim of absolute control over the said properties and to deny enjoyment of the said properties to the rest of the legal heirs of Jogindra Nath, namely, the plaintiffs.

55. On the basis of settlement and consent of their own understanding of the Deed of Settlement and the consent decree, the defendants have agreed that their right is emanating from a family arrangement. This family arrangement gives equal rights to each of the legal heirs of Jogindra Nath to enjoy the property absolutely and forever after the death of Kamalabala.

56. The Courts lean strongly in favour of the family arrangements to bring about harmony in a family and do justice to the various members and avoid in anticipation future disputes which might ruin all of them. The object of family arrangement is to protect the family from long-drawn litigation or perpetual strifes which mar the unity and solidarity of the family and create hatred and bad blood between the various members of the family. (Krishna Beharilal Vs. Gulabchand and Others, : Kale and Others Vs. Deputy Director of Consolidation and Others,)

57. The Deed of Settlement speaks of a family arrangement. The consent decree passed in Suit No. 584 of 1950 which clearly records that the sons of Balai Chand had agreed to arrive at the said settlement which is in the nature of a family arrangement in tune and consonance with the Deed of Settlement of 1948 so that the unity and solidarity of the family is maintained and no bad blood exists between the parties. This arrangement has been given effect to and acted upon by the parties.

58. There is a distinction between the Deed of Settlement and Will. There had been a vesting of interest of the properties in terms of the said Will then the settlor would not have executed the subsequent Deed of Settlement. The intention of the settlor is that the settlor did not wish to create any right in presenti in favour of the beneficiaries mentioned in the said Will on the basis of the documents disclosed in this proceeding, namely the Will creating the trust, the Deed of Settlement and the consent decree, the Court would be required to construe the said documents in order to ascertain and find out the real intention of the settlor. The Court would be required to take a comprehensive view of all the terms of all the documents. The Court would also be required to take into consideration between the vested interest and contingent interest since in construing such documents, the Court would be required to make a construction with a bias in favour of vested interest as the property once vested ordinarily cannot be divested. The vesting of the property is in terms of the Deed of Settlement and as I have observed after the death of Kamalabala, the legal heirs of Jogindra Nath became entitled to the enjoyment of the said properties. They have become jointly the absolute owners of all the said properties. The purpose of the Deed of Settlement that all of them would enjoy the property as owners

thereof.

59. The pleadings and the evidence of the defendants show that the said defendants treated the said Deed of Settlement and the consent decree passed in Suit No. 584 of 1950 as a family arrangement and they claim their right through the said Deed of Settlement and the consent decree passed in the deed of settlement. This family arrangement gives equal right to each of the legal heirs of Jogindra Nath to enjoy the properties absolutely forever and after the death of Smt. Kamalabala. Since the disputes have arisen with regard to the enjoyment of such properties by reason of the stand taken by Gopal Chandra, in my view, the plaintiff is entitled to partition of the property covered under the said Deed of Settlement. Gopal Chandra has no exclusive right to enjoy the said property. Gopal Chandra is also accountable for the rents, issues and profits realized from the properties. Accordingly, in my opinion, the plaintiff is entitled to claim partition and the parties are entitled to the respective shares in the properties.

60. It is no doubt that the properties are being maintained and looked after by Gopal Chandra Sadhukhan. Gopal Chandra has deposed that he is maintaining the properties and also collected some rents from their tenants. The evidence of Gopal Chandra is that the properties by and large maintained by him out of his resources. Gopal Chandra Sadhukhan is in exclusive possession in part of the property in question. The plaintiffs are not in possession of the properties. There are acrimonies between the parties and for which even the realizations of rents have been affected. The municipal rates and tax receipts disclosed in this proceeding show that the property is still standing in the name of Jogindra Nath Sadhukhan. It is not described as a trust property.

61. Although, a claim was made in the plaint about inventory and disclosures of ornaments and other movables but considering the weakness of the deposition and lack of evidence, Mr. Aniruddha Mitra, the learned Counsel appearing on behalf of the plaintiffs submitted that such prayers are not being pressed. Even without such submission, this Court on the basis of the evidence is not inclined to pass any order for inventory of ornaments and/or movables. Accordingly, such prayer is disallowed.

62. There shall be a preliminary decree declaring the entitlement of shares of the parties in the properties to the extent as indicated below:-

1. Subhas Chandra Sadhukhan-Plaintiff No. 1 (a)-1/12th Share
2. Ajay Kumar Sadhukhan-Plaintiff No. 1(b)-1/12th Share
3. Smt. Jharna Paramanik-Plaintiff No. 1(c)-1/12th Share
4. Jayanta Sadhukhan-Plaintiff No. 1(d)-1/24th Share
- 4(a). Piyali Ghosh (Sadhukhan)-Plaintiff No. 1(e)-1/24th Share
5. Smt. Jaya Sadhukhan-Plaintiff No. 2-1/9th Share

6. Smt. Rubi Das-Plaintiff No. 3-1/9th Share

7. Smt. Sandhya Rani Sadhukhan-Defendant No. 1-1/9th Share

8. Gopal Chandra Sadhukhan-Defendant No. 2-1/9th Share

9. Ram Prasad Adhikary-Defendant No. 31/18th Share

9(a). Shrimanta Adhikary-Defendant No. 3(a) 1/18th Share

63. The defendants are directed to furnish accounts of rents, issues and profits in respect of the properties to the plaintiffs within two months from date.

64. The parties are directed to make partition of the properties in suit in accordance with the respective shares declared by this preliminary decree amicably within two months from this date failing which either of the parties will be at liberty to move this Court for appointment of an advocate Commissioner to effect partition by metes and bounds.

65. The Department is directed to draw up the decree as expeditiously as possible.

66. Urgent Xerox certified copy of this judgment, if applied for, be given to the parties on usual undertaking.